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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. _____

CARLO MAZZELLA,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SHULTS, HETHERINGTON,
LINDER & TARICS
ROBERT A. SHULTS
1800 West Loop South
Suite 950
Houston, Texas 77027
(713) 961-1823
Counsel for Petitioner

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

18 pp

QUESTIONS PRESENTED FOR REVIEW

1. The opinion of the Court of Appeals is in error in failing to hold, as a matter of law, that the conduct of the agents of the Drug Enforcement Administration was so outrageous as to violate the due process clause of the Fifth Amendment to the United States Constitution and this Court should review the cases establishing this due process right so as to set definitive guidelines for lower courts and should likewise consider the conduct of the federal agents in light of the inchoate nature of the offense for which the Petitioner was convicted.

2. The Court of Appeals erred in holding that there was sufficient evidence to establish that Petitioner's conduct constituted a "substantial step" toward the commission of the crime of attempting the manufacture of a controlled substance and that Petitioner's conduct went beyond "mere preparation" for the alleged commission of an offense.

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v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Carlo Mazzella, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on July 17, 1985.

REFERENCE TO REPORTS BELOW

1. Petitioner was tried in the United States District Court for the Western District of Arkansas. This trial proceeding was not published, but the trial record is available for review.

2. On July 17, 1985, the opinion of the United States Court of Appeals for the Eighth Circuit was filed affirming Petitioner's conviction and that proceeding bears No. 84-1779 in the Court of Appeals. At the time of the preparation of this Petition, the opinion of the Court of Appeals has not yet been published, but a true and correct copy thereof is attached in the Appendix of this Petition. It is in regard to this judgment that the Petitioner seeks a writ of certiorari.

STATEMENT OF GROUNDS OF JURISDICTION

1. Jurisdiction is conferred on this Court by the provisions of 18 U.S.C. 3772 and Rule 17, Revised Rules of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

2. "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both, which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. 846.

STATEMENT OF THE CASE

The Petitioner was charged with the offense of criminal attempt alleging that he attempted to manufacture methamphetamine in violation of 21 U.S.C. 846. Petitioner's conviction followed a nonjury trial and a sentence of eighteen (18) months imprisonment was imposed.

The facts indicate that the Drug Enforcement Administration (DEA) established a storefront, undercover chemical and supply company in Chicago, Illinois known as Universal Solvents of America (Universal). The DEA placed advertisements in several magazines including a publication known as *Easy Rider*.

After seeing the advertisement, Petitioner corresponded with Universal requesting a catalog. On August 28, 1982, Petitioner telephoned Universal inquiring about the status of his request that he be supplied with a catalog. A DEA agent, indicating to the Petitioner that he was an employee of Universal, stated that the catalogs would be unavailable in the near future and suggested that the Petitioner correspond directly concerning the objects which he wished to purchase. Universal received a letter from Petitioner requesting price quotes on various items including phenyl 2-propanone (propanone). On September 17, a government agent posing as a Universal employee corresponded with Petitioner informing him

that propanone was a controlled substance and could not be supplied directly. See, 21 U.S.C. 812. Propanone is a substance necessary in the manufacture of methamphetamine but is a precursor and therefore not an end product in regard to the manufacture of methamphetamine. In the same correspondence, the government agent indicated that Universal could "supply all chemicals and equipment necessary to produce (propanone) without restriction" and further suggested that Petitioner purchase "our very popular kit for $700.00 which includes all chemicals, equipment and glassware necessary" to manufacture propanone. This correspondence further specifically indicated to the Petitioner that "a qualified chemist (is) available to answer questions." The receipt of this generous offer prompted an additional telephone call from Petitioner to Universal and a resulting telephone call with the same government agent. Petitioner stated in this call that he wished to place an order and requested that the order be expedited. The agent then took Petitioner's order for the "kit" which the agent had suggested that the Petitioner purchase.

On October 26, 1982, a DEA agent, disguised as an employee of United Parcel Service, delivered to Petitioner's home in DeQueen, Arkansas, several cardboard boxes allegedly containing various chemicals and other items comprising the "kit" which had been ordered. The C.O.D. price of the articles to be delivered was $1,023.00 which was requested by the agent/UPS driver. Petitioner did not have these funds available and, upon the urging of the government agent posing as the UPS driver, Petitioner made a partial payment of $850.00 for delivery of the materials with the further instructions from the agent that UPS would accept the balance at a later date.

The Petitioner then took the boxes delivered by the agent to a location away from his home and deposited them under a tarpaulin in a nearby wooded area. Upon return to his residence, Petitioner was arrested by DEA agents. After receiving his constitutional warnings from the arresting DEA agents, the Petitioner signed a written statement setting out the basic facts involved in this prosecution.

After the recovery of the boxes delivered to the Petitioner, it was determined that some of the boxes had been opened but all of the containers inside the boxes remained sealed. The DEA agents further recovered from Petitioner's residence a book entitled "Speed". This book describes, in very general terms, a process allegedly usable to manufacture methamphetamine.

The chemist who testified at trial on behalf of the government testified that it would be "very difficult" to manufacture methamphetamine using the instructions from the booklet confiscated from the Petitioner. Additionally, there is no showing of any type or any evidence of any kind that the Petitioner had any prior involvement in drug usage, drug manufacture or other similar activity nor is there any showing that the Petitioner had any training in chemistry, any knowledge save and except the booklet retrieved as to how to manufacture methamphetamine nor any other knowledge of any kind relating to the manufacture or distribution of controlled substances generally and methamphetamine specifically.

REASONS FOR GRANTING THE WRIT

1. THE OPINION OF THE COURT OF APPEALS ERRONEOUSLY CONCLUDES THAT THE ACTIVITY OF THE DEA IN SUPPLYING ALL OF THE CHEMICALS, EQUIPMENT, AND OTHER MATTERS ALLEGEDLY NECESSARY FOR THE MANUFACTURE OF METHAMPHETAMINE DOES NOT VIOLATE THE DUE PROCESS RIGHTS OF THE PETITIONER SINCE SUCH CONDUCT IS OUTRAGEOUS WHEN THE PETITIONER IS LATER CHARGED WITH AN INCHOATE OFFENSE TOTALLY BASED ON THE POSSESSION OF THESE PRODUCTS SUPPLIED TO THE PETITIONER BY GOVERNMENT AGENTS.

Great confusion and diversity of interpretation has surrounded the Supreme Court's decisions in *United States v. Russell,* 411 U.S. 423, 93 S. Ct. 1637, 36 L.Ed. 366 (1973) and *Hampton v. United States,* 425 U.S. 484, 96 S. Ct. 1646, 48 L.Ed.2d 1113 (1976) as those cases relate to due process claims regarding what has come to be referred to as "outrageous government involvement" or "outrageous government conduct" in criminal prosecutions. This is especially true in cases, such as the one at bar, where there is no issue of entrapment as that defense has classically been defined but which involved purely due process claims under the Fifth Amendment by reason of the pervasiveness of the governmental activity in the commission of the alleged offense. In part, this is due to confusion, even by the drafters of the majority and plurality opinions in *Hampton* and *Russell,* in regard to concepts which apply separately

to due process claims and entrapment claims. Hence, Justice Rehnquist writes in *Russell* that,

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction . . . the instant case is distinctly not of that breed. *Russell,* supra at 433-434.

However, the same writer, when writing for the plurality in *Hampton,* stated:

> But in each case (*Russell* and *Hampton*) the Government agents were acting in concert with the defendant, and in each case either the jury found or the defendant conceded that he was predisposed to commit the crime for which he was convicted. The remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, *lies solely in the defense of entrapment.* . . . The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the defendant." *Hampton,* supra at 490-491. (emphasis added).

Therefore, what was given in *Russell,* at least by implication, was taken away in *Hampton.* While the above quoted sections of *Hampton* represent only a plurality opinion and while concurring opinions still refer to a due process claim for outrageous government involvement in the allegedly criminal enterprise, lower courts are left to speculate and guess as to what the limitations and parameters are of permissible governmental activity in the detection and/or instigation of criminal activity.

Clearly, there are certain types of governmental activity in the area of the building of cases against suspects which, while not clearly defined in the Constitution, are of such outrageous magnitude that they violate the requirements of due process. *Rochin v. California,* 342 U.S. 165, 72 S. Ct. 205, 96 L.Ed. 183 (1952). Just as clearly, this is what was initially envisioned by the majority opinion in *Russell* and subsequently referred to by the concurring writers in *Hampton.*

While this Court should accept the case at bar for no other reason other than to clarify the conflicting signals sent by *Russell* and *Hampton,* another reason exists for granting the writ in regard to a review of the due process claims in this particular case. The significant cases from the various Courts of Appeals struggling to apply the holdings of *Russell* and *Hampton* to cases involving governmental activity approaching due process parameters involve completed criminal activity such as the completed manufacture, sale, delivery or possession of controlled substances or other criminal implements or situations where the completed criminal instrument is readily available. See, generally, *United States v. Quinn,* 543 F.2d 640 (8th Cir. 1976); *United States v. Leja,* 563 F.2d 244 (6th Cir. 1977); *United States v. Twigg,* 588 F.2d 373 (3rd Cir. 1978); *United States v. Tobias,* 662 F.2d 381 (5th Cir. 1982); *United States v. Yater,* 756 F.2d 1058 (5th Cir. 1985); *United States v. So,* 755 F.2d 1350 (9th Cir. 1985). A distinction should be drawn and is mandated by due process considerations between these cases where the government provided encouragement, constituent elements for manufacture or sale, premises or other help to admittedly predisposed suspects who then utilized these aids in another step

indicating their completion of the criminal enterprise and the case at bar where an admittedly predisposed suspect was supplied with chemicals and equipment at least two steps removed from the final product and then prosecuted solely for the inchoate offense of criminal attempt based upon his possession of the materials supplied to him by government agents.

It is not intended that the due process claims advanced in this section of the petition be confused with the error brought forth in regard to the Court of Appeals holding that there was a sufficient overt act on the part of the Petitioner to go beyond the limits of mere preparation. However, this distinct, due process claim relates to that murky line inherent in the prosecution of inchoate offenses. Since entrapment is not the issue in regard to Petitioner's due process claims, the predisposition of the Petitioner is not controlling. That being the case, one is left with a situation where the government supplies chemicals, equipment and available technical expertise for manufacturing a chemical which then must be used separately and distinctly to manufacture the substance alleged in the indictment, namely methamphetamine. With no further activity than the receipt of these precursors that are several steps away from the completed criminal offense which the Petitioner allegedly attempted, he is prosecuted for criminal attempt. This fact, when coupled with the fact that the government agents supplied all of the materials which the Petitioner possessed and which led to this charge and since the government's activity in supplying these constituent elements was so pervasive, a distinct and distinguishable difference exists between the nature of the due process review in this case and in the other cases relating to *Russell* and *Hampton*

in which a completed manufacturing, sale or delivery process, carried out by the suspects, flowed from the governmental activity involved.

In the case at bar, the Court should review these facts as they relate to the due process claims involving outrageous government involvement and thereby draw some more clearly defined test for determining the permissible limit of governmental involvement in soliciting, suggesting and providing the total manner and means then used to convict a criminal defendant of an inchoate offense where the overt act involved is solely the receipt of the sum total of these constituent elements from government agents.

2. THE HOLDING OF THE COURT OF APPEALS THAT THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT PETITIONER'S CONDUCT CONSTITUTED A "SUBSTANTIAL STEP" TOWARD THE COMMISSION OF THE OFFENSE OF CRIMINAL ATTEMPT WAS ERRONEOUS AND SHOULD BE CORRECTED BY THE GRANTING OF THE WRIT AND, FURTHER, THIS COURT SHOULD CLARIFY THE CONGRESSIONAL INTENT IN THIS AREA OF LAW AND UNIFY THE DISPARATE HOLDINGS OF THE VARIOUS COURTS AS TO THE MANNER IN WHICH THE DEFINITION OF ATTEMPTS SHOULD BE APPLIED TO SPECIFIC CASES.

In placing too much emphasis on the intent of the Petitioner and undue emphasis upon the necessity of a concomitant overt act amounting to more than mere preparation to commit the offense, the Court of Appeals

fell into error in determining the sufficiency of the evidence to support Petitioner's conviction. This error is exacerbated by the failure of the Court of Appeals to draw a distinction between the factual situations in the various reported cases dealing with attempts and the factual situation in the instant case involving a charge of attempt to manufacture when the last overt act is several steps away from any possible completion of the alleged criminal design.

There is no comprehensive statutory definition of the inchoate offense of attempt in federal law. *United States v. Manley,* 632 F.2d 978 (2nd Cir. 1980), cert. den., sub nom.; *Williams v. United States,* 449 U.S. 1112, 101 S. Ct. 922, 66 L.Ed.2d 841 (1981); *United States v. Monholland,* 607 F.2d 1311 (10th Cir. 1979). When considering the proper, general standard to utilize in an effort to define the offense of attempt, the courts have generally utilized and adopted the standard found in Section 5.01 of the American Law Institute's Model Penal Code (proposed official draft 1962). This formulation generally sets out that the elements of an attempt are (1) an intent to engage in criminal conduct, and (2) conduct constituting a "substantial step" towards the completion of the substantive offense which strongly corroborates the actor's criminal intent. *United States v. Joyce,* 693 F.2d 838 (8th Cir. 1982). Mere intention to commit a crime and acts constituting mere preparation to carry out that intention can never amount to an attempt. *United States v. Rivera-Sola,* 713 F.2d 866 (1st Cir. 1983); *United States v. Stallworth,* 543 F.2d 1038 (2nd Cir. 1976).

The holdings of the Courts of Appeals, however, are so disparate in their application that the Court of Ap-

peals for the First Circuit has taken the unusual step of indicating that the determination is so difficult and perplexing that ". . . it is unwise to rely too heavily on other cases from a different court." *United States v. Rivera-Sola,* supra at 871.

The writ should be granted to set forth a specific rationale for lower courts to utilize in their attempts to apply factual situations to the definition of attempt which has been adopted by lower courts from the Model Penal Code as much by default as rational statutory interpretation by the Supreme Court. Additionally, as such formulation specifically relates to the case at bar, the application by the Court of Appeals of that Court's prior holding in *United States v. Joyce* fails to make a significant distinction.

In most of the other reported cases dealing with attempts in the narcotics area, all of the cases related to facts and circumstances surrounding a specific intent with that intent being coupled with the immediate possibility of the culmination of the intent by reason of the fact that the defendants and the government were dealing with a specific controlled substance which was immediately available for transfer, possession, or other illegal use. In the instant case, the government chemist at trial testified that the substances bought by the Petitioner, all of which were legal to possess, purchase and transport, were several steps away from the manufacture of methamphetamine. Additionally, the chemist testified that it would be difficult but not technically impossible to utilize the formulations in the possession of the Petitioner to eventually produce methamphetamine after the production of the precursor materials. Lastly, there was no evidence from the government at all of any prior trans-

actions on the part of the Petitioner, no technical expertise in the area of chemistry or the production of methamphetamine on the part of the Petitioner, and no evidence of the involvement of other persons who brought such expertise to the alleged intended criminal enterprise.

While the law of attempt has been difficult in its application, the facts in this case much more clearly fall within the ambit of mere preparation than any substantial step which would result in a situation where ". . . the (attemptor's act having) passed the preparation stage so that if it is not interrupted extraneously, it will result in a crime." *United States v. Monholland,* supra at 1319. The case at bar more closely follows several of the classical formulations and applications of attempt law which have held that mere preparation to carry out an admittedly held intent fall short of a substantial step toward the carrying out of that intent. *Rex v. Robinson,* 2 K.B. 342 (1915); *People v. Rizzo,* 246 N.Y. 334, 158 N.E. 888 (1927); *People v. Orndorff,* 261 Cal. App. 2d 212, 67 Cal. Rptr. 824 (1968).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

SHULTS, HETHERINGTON,
LINDER & TARICS

By: _____

ROBERT A. SHULTS
1800 West Loop South
Suite 950
Houston, Texas 77027
(713) 961-1823

Attorney for Petitioner

APPENDIX

Containing the following materials:

1. Opinion of the United States Court of Appeals for the Eighth Circuit from which review is sought.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1779

United States of America,
Appellee,

v.

Carlo Mazzella,
Appellant.

Appeal from the United States District Court
for the Western District of Arkansas

Submitted: January 15, 1985

Filed: July 17, 1985

Before HEANEY, ROSS and McMILLIAN, Circuit Judges.

McMILLIAN, Circuit Judge

Carlo Mazzella appeals from a final judgment entered in the District Court[1] for the Western District of Arkansas following a non-jury trial finding him guilty of attempting to manufacture methamphetamine in violation of 21 U.S.C. § 846. The district court sentenced appellant to

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1. The Honorable George Howard, Jr., United States District Judge for the Eastern and Western Districts of Arkansas.

a term of eighteen months imprisonment. For reversal appellant argues that the district court erred in (1) denying his motion to dismiss on the grounds of outrageous government conduct and (2) denying his motion to dismiss on the grounds that his conduct failed to constitute an attempt. For the reasons discussed below, we affirm the judgment of the district court.

The facts in this case are undisputed. In an attempt to identify and prosecute manufacturers of illicit drugs, the Drug Enforcement Administration (DEA) established Universal Solvents of America (Universal) as an undercover chemical and supply company. In order to entice business from individuals who were seeking to produce illicit drugs, the DEA placed an advertisement in several magazines oriented toward illicit drug usage. The advertisement consisted of a copy of Universal's business card.

Upon reading the advertisement, appellant wrote a letter to Universal requesting a catalogue. On August 28, 1982, appellant telephoned Universal inquiring about the status of his request. A DEA agent, posing as a Universal employee, informed appellant that catalogues would be unavailable for a couple of weeks and suggested that appellant mail Universal a list of items for a price quote. On August 30, appellant mailed a letter requesting price quotes on various items, including phenyl 2-propanone, a Schedule II controlled substance. 21 U.S.C. § 812. On September 14, appellant telephoned Universal inquiring about his letter requesting price information. On September 17, DEA agent Mel Schabilion, posing as Universal employee Mel Sanders, wrote appellant that phenyl 2-propanone was a controlled substance and therefore not available from Universal but that Universal could

"supply all chemicals and equipment necessary to produce [phenyl 2-propanone] without restriction" and suggested that appellant purchase "our very popular kit for $700 which includes all chemicals, equipment and glassware necessary" to manufacture phenyl 2-propanone. The letter additionally stated that "a qualified chemist [is] available to answer questions." On October 19, appellant telephoned Universal and spoke with DEA agent Schabilion. Appellant stated that he wanted to place an order for some "stuff" and that he needed it quickly. DEA agent Schabilion took appellant's order for the "kit" described in the September 17 letter and various other chemicals.

On October 21, Universal shipped appellant's order to the DEA's regional office in Little Rock, Arkansas. On October 26, DEA agent James Stepp, posing as a United Parcel Service (UPS) driver, telephoned appellant to arrange a C.O.D. delivery of five packages containing appellant's order, costing $1,023. Because he only had $850 in cash and did not want to write a check, appellant stated that he would pick up the packages at the UPS storage unit the following morning. DEA agent Stepp responded that he did not want to take the packages back and would be willing to accept the $850 as a partial payment with the balance due at a later date.

At approximately 4:30 p.m. that same day, DEA agent Stepp, disguised as a UPS driver, delivered the packages to the address appellant had previously given to DEA agent Schabilion. Appellant apparently resided at this address. Appellant paid DEA agent Stepp $850 in cash and signed a receipt. Immediately after the delivery, appellant drove away with the chemicals and hid them under a tarpaulin on the side of a dirt road. At approximately 5:30 p.m., appellant returned to his home

where DEA agents awaited his arrival. The DEA agents advised appellant of his constitutional rights and placed him under arrest for attempting to manufacture methamphetamine. After unsuccessfully trying to secure legal representation, appellant told the DEA agents that he wanted to cooperate with them.

With appellant's help, the DEA agents recovered the five boxes appellant had hidden. Some of the boxes had been opened, but all of the containers inside the boxes remained sealed. Appellant then directed the DEA agents to his home where he kept a book entitled "Speed." This book describes how to manufacture methamphetamine. After the physical evidence had been retrieved, appellant, in response to a DEA agent's request, wrote and signed a statement reciting his version of how the events transpired in connection with his arrest. Appellant admitted in the statement that his "intentions [were] to attempt to make speed from the aforementioned chemicals."

At trial defense counsel argued that appellant had been entrapped and also that his actions did not amount to an attempt because he had not taken a "substantial step" toward the commission of the crime. The district court rejected appellant's arguments, specifically finding that appellant was predisposed to commit the crime charged and that he had taken a "substantial step" toward manufacturing an illicit drug.

Appellant makes two arguments on appeal. First, appellant argues that the conduct of the DEA agents was so outrageous as to violate the principles of fundamental fairness embodied in the due process clause of the fifth amendment. Second, appellant argues that the evidence

presented was insufficient to establish that appellant's conduct constituted a "substantial step" toward the commission of the crime of attempting to manufacture methamphetamine.

Appellant does not argue that the district court erred in rejecting his entrapment defense.[2] Rather, he asserts a distinctly separate but related due process defense. "Recent cases have recognized . . . that apart from any question of predisposition of a defendant to commit the offense in question, governmental participation may be so outrageous or fundamentally unfair as to deprive the defendant of due process of law or move the courts in the exercise of their supervisory jurisdiction of criminal

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2. The Supreme Court first recognized and applied the entrapment defense in *Sorrells v. United States*, 287 U.S. 435 (1932). Chief Justice Hughes speaking for the Court held that the focus of analysis of the entrapment defense must be on the defendant's intention or predisposition to commit the crime. *Id.* at 451. The majority of subsequent decisions continue to apply this standard. *See, e.g., Hampton v. United States*, 425 U.S. 484, 492 (1976) (Powell, J., concurring); *United States v. Russell*, 411 U.S. 423, 436 (1973); *United States v. Webster*, 649 F.2d 346, 348 (5th Cir. 1981).

Some federal courts have adopted the position taken by Justice Roberts' concurrence in *Sorrells* that analysis of an entrapment defense should objectively focus on the degree of government involvement in the crime. 287 U.S. at 459. *See Greene v. United States*, 454 F.2d 783, 786-87 (9th Cir. 1971); *Smith v. United States*, 118 U.S. App. D.C. 38, 44, 46, 331 F.2d 784, 790, 792 (1964) (banc). The objective approach is favored by a majority of commentators, *see* National Commission on Reform of Federal Laws, A Proposed New Federal Criminal Code § 702(2) (1971); Model Penal Code § 2.13 (Proposed Official Draft, 1962); *see also* Dix, *Undercover Investigating and Police Rulemaking*, 53 Tex. L. Rev. 203, 246-48 (1975); Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. Pa. L. Rev. 245, 250-52 (1942); Note, *Entrapment*: Sorrells *to* Russell, 49 Notre Dame Law. 579 (1974); however, it has never been adopted by a majority on the Supreme Court. *See Hampton v. United States*, 425 U.S. at 488-89; *United States v. Russell*, 411 U.S. at 433-36; *Sherman v. United States*, 356 U.S. 369, 372 (1958).

justice" to bar the conviction. *United States v. Quinn,* 543 F.2d 640, 648 (8th Cir. 1976).

The outrageous conduct defense has its origins in *United States v. Russell,* 411 U.S. 423 (1973). In that case an undercover narcotics agent approached the defendant and offered to give him a chemical essential to the manufacture of methamphetamine in return for one half of the methamphetamine the defendant produced. The defendant went along with this "scheme" and was subsequently prosecuted for manufacturing and distributing the illegal drug. After receiving a standard entrapment instruction, the jury found the defendant guilty on all counts. On appeal the defendant argued that the facts showed entrapment as a matter of law. The Ninth Circuit agreed and held that as a matter of law "a defense to a criminal charge may be founded upon an intolerable degree of government participation in the criminal enterprise." 459 F.2d 671, 673 (1972). The Supreme Court, however, reversed, concluding that the government had merely afforded the defendant an opportunity to commit the offense. 411 U.S. at 435-36. The majority, however, recognized that a defense based on the government's overinvolvement in the criminal enterprise would be available where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." *Id.* at 431-32. The majority found that the government agent's conduct in *Russell* was not so outrageous.

The only other Supreme Court case considering the outrageous conduct defense was *Hampton v. United States,* 425 U.S. 484 (1976). In that case the defendant was convicted of distributing heroin which had been

supplied by a government informant and sold to an undercover agent. The plurality opinion, written by Justice Rehnquist, stated that the remedy of the criminal defendant with respect to the acts of government agents lies solely in the defense of entrapment, and a defendant's predisposition to commit the crime should operate as a bar to that defense. *Id.* at 490. Justice Powell, joined by Justice Blackmun, concurred in the result but was "unwilling to join the plurality in concluding that, no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the government is able to prove predisposition." *Id.* at 495. Justice Powell emphasized that cases where the due process defense will be successful are rare. "Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction." *Id.* at 495 n.7.[3]

The Supreme Court's analysis in *Russell* and *Hampton* has left unclear the types of government conduct considered to be outrageous. The majority of lower court decisions apply a totality of the circumstances approach to assess the fairness of the government's involvement in crime-related activity. *See United States v. Tobias,* 662 F.2d 381 (5th Cir. 1981), *cert. denied,* 457 U.S. 1108 (1982); *United States v. Leja,* 563 F.2d 244 (6th Cir.

3. The dissent argued that analysis of the entrapment defense should focus on the extent of the government agent's involvement in the crime. *Hampton v. United States,* 425 U.S. at 497. The dissenting justices also agreed with Justice Powell that due process principles or the Court's supervisory powers would act to bar conviction, even though the defendant might have been predisposed, where the conduct of the law enforcement authorities is sufficiently offensive. *Id.* The dissent concluded that the government agents' conduct in *Hampton* was sufficiently offensive to bar conviction. *Id.*

1977), *cert. denied,* 434 U.S. 1074 (1978); *United States v. Twigg,* 588 F.2d 373 (3d Cir. 1978). A thorough survey of these cases indicates that courts have rarely characterized the government's conduct as outrageous.[4]

Appellant contends that the involvement of the DEA in placing the advertisement, sending the catalogue, providing assistance and technical knowledge, suggesting the popular "kit," and personally delivering the kit to his home constitutes conduct so outrageous as to violate the due process clause of the fifth amendment. "Although a totality of the circumstances standard must be applied, it is beneficial to review the parts that make up the whole." *United States v. Tobias,* 662 F.2d at 387.

The DEA's placement of the advertisement in a magazine can in no way be considered to violate the principles of fundamental fairness embodied in the due process clause because the advertisement was neutral in character and pertained to a legal enterprise. The DEA suggested that appellant send Universal a list of chemicals for a price quote. Appellant responded of his own volition and asked for a price quote on several chemicals used in the manufacture of methamphetamine, including phenyl 2-propanone, a controlled substance. The DEA sent appellant a letter stating that phenyl 2-propanone was a controlled substance and could not be sold. The letter then informed appellant that a "kit" was available to make phenyl 2-propanone. Contrary to appellant's statement contained in his brief that "the DEA agents 'sug-

4. For a compilation of drug-related cases where defendants unsuccessfully argued outrageous government conduct, see *United States v. Tobias,* 662 F.2d 381, 392 n.2 (5th Cir. 1981), *cert. denied,* 457 U.S. 1108 (1982).

gested' that he order the 'kit' which contained the necessary ingredients and apparatus with which to manufacture *methamphetamine,*" (emphasis added), phenyl 2-propanone (methyl benzyl ketone) is not methamphetamine. We do not believe that the DEA agents acted "outrageously" in offering to sell appellant a "kit" to manufacture a chemical which appellant had previously requested in his letter of August 30, 1982. Appellant responded to the DEA's letter of his own volition and placed an order for the kit and several other chemicals, including methylamine, hydrochloric acid, aluminum turnings, and hydrobromic acid. The DEA became alerted to appellant's plan not because he ordered the "kit" but because he ordered the kit in conjunction with these other chemicals which, when properly combined, produce methamphetamine.

The DEA never told appellant what chemicals were needed to manufacture methamphetamine; appellant got the "recipe" from a book entitled "Speed." The DEA offered assistance to appellant, but none was ever given. The last stage of the DEA's involvement came when a DEA agent, disguised as a UPS employee, delivered the order to the address appellant had previously given to another DEA agent. Appellant took delivery of the chemicals by signing a receipt and paying $850. It can hardly be said that delivering the chemicals pursuant to appellant's request is outrageous conduct or unfair. As the Fifth Circuit said in *United States v. Tobias,* 662 F.2d at 387, "[b]ut here, the drug transaction would have stopped at any time that [the defendant] made no further calls." In the present case, appellant could have ended his participation in the "scheme" at any time up to and including the delivery of the chemicals. Consider-

ing the government's conduct as a whole, we cannot say that it was so outrageous as to violate the due process clause of the fifth amendment.

Appellant next argues that the evidence was insufficient to establish that his conduct constituted an attempt to manufacture methamphetamine. Appellant contends that his ordering, receiving, and possessing the precursor chemicals and equipment was "mere preparation." While admitting that he intended[5] to manufacture methamphetamine, appellant denies that his conduct constituted a "substantial step" toward the commission of the crime. We do not agree.

Appellant was charged with and convicted of attempting to manufacture methamphetamine in violation of 21 U.S.C. § 846.

> [T]he requisite elements of attempt are (1) an intent to engage in criminal conduct, and (2) conduct constituting a "substantial step" towards the commission of the substantive offense which strongly corroborates the actor's criminal intent. . . . [W]hether conduct represents a "substantial step" toward the commission of the criminal design is . . . "a question of degree," necessarily depending on the factual circumstances peculiar to each case.

United States v. Joyce, 693 F.2d 838, 841 (8th Cir. 1982).

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5. As the Tenth Circuit stated in *United States v. Monholland,* 607 F.2d 1311, 1318 (10th Cir. 1979),

> mere intention to commit a specified crime does not amount to an attempt. It is essential that the defendant, with the intent of committing the particular crime, do some overt act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime.

> A substantial step must be something more than mere preparation, yet may be less than the last act necessary before the actual commisison of the substantive crime . . . . In order for behavior to be punishable as an attempt, it need not be incompatible with innocence, yet it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute.

United States v. Manley, 632 F.2d 978, 987-88 (2d Cir. 1980), *cert. denied,* 449 U.S. 1112 (1981).

Even having these formulations as guideposts, the determination whether a defendant's conduct amounts to a "substantial step" is necessarily dependent on the particular factual circumstances in the case at hand. Appellant's conduct consisted of ordering, receiving and possessing the chemicals and equipment necessary to manufacture methamphetamine. Appellant argues that because the chemical containers remained unopened and were in his possession for less than one hour, his conduct never amounted to a substantial step. However, in contrast to possessory offenses, "physical participatory crimes [such as manufacturing] . . . [require] a defendant . . . [to] engage in numerous preliminary steps which brand the enterprise as criminal and are incompatible with innocent purposes." *United States v. Rivera-Sola,* 713 F.2d 866, 870 (1st Cir. 1983); *see also* Model Penal Code § 5.01(2)(e),(f) (Proposed Official Draft 1962). Appellant's ordering and possession of the specific combination of chemicals required to manufacture methamphetamine can hardly be said to be an innocent co-

incidence; rather the ordering and possession of the particular combination of chemicals "brand the enterprise as criminal and [is] incompatible with innocent purposes." 713 F.2d at 870. Appellant does not suggest that he ordered these chemicals for a purpose other than to manufacture methamphetamine; on the contrary, appellant admits his illicit design for the chemicals. Additionally, the appellant possessed a book entitled "Speed" which described the manufacturing process for the illicit drug. A government chemist testified that although it would be difficult for someone without prior training in chemistry to manufacture methamphetamine with the aid of the book, it would not be impossible.

After carefully considering appellant's conduct and the surrounding circumstances, we conclude there was sufficient evidence to warrant a finding that appellant's conduct constituted a "substantial step" toward the manufacture of methamphetamine. We note, however, that appellant's intent to manufacture methamphetamine was clearly evidenced by his signed statement and corroborated by the fact that he ordered and possessed all of the necessary chemicals which, when properly combined, produce methamphetamine.

Accordingly, the judgment of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.